Employment Edge 97th Edition - Employee Free Choice Act Introduced In Congress: What Employers Can Do

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The union-backed and much-talked-about Employee Free Choice Act (EFCA) was introduced in Congress yesterday, March 10, 2009. The legislative fight over the EFCA will begin soon, although it may be delayed by some cloture-related issues, such as the seating of a second Minnesota Senator. In the meantime, employers should ensure that they are familiar with the requirements and ramifications of the new law, that they contact their representatives in Congress to express their views, and that they begin taking lawful steps to prevent unionization, which steps will help regardless of whether the EFCA becomes law.

I. What the EFCA Does

A. Card Check Recognition Without Secret Balloting

The EFCA would amend the National Labor Relations Act (NLRA) in three significant respects. The most troublesome provision for employers and the one receiving a lot of media attention is the abolishment of the right to a "secret ballot" election process by which employees decide whether or not to be represented by a union. Currently, the NLRA does not require an employer to recognize a union unless and until the union receives majority support from employees in a secret ballot election. This election is conducted by the National Labor Relations Board (NLRB) following a 42-day campaign period. The campaign period is commenced after a petition by the union and notification to the employer of the union's attempt to organize. During the campaign period, both the union and the employer can attempt to persuade employees of their positions on unionization. When the election occurs it is conducted by the NLRB to ensure that it is free and fair.

The EFCA seeks to change this procedure by eliminating an employer's right to a secret ballot election before requiring the employer to accept unionization of its workforce. The Act would require employers to recognize a union upon being presented with "authorization" cards signed by a majority of its employees, presumably indicating that they desire union representation.

The bill's elimination of an employer's right to a secret ballot election is problematic for several reasons:

- An employer may not be aware that organizing activity is occurring, eliminating its ability to educate employees and respond to union arguments;

- Employees will lose the ability to hear both sides of the argument; and

- Employees lose their ability to vote anonymously, creating a likelihood of coercion and retaliation when organizers know precisely which employees are supporting the union and which are not.

B. Interest Arbitration of First Contracts

The second important feature of the EFCA is that it would add provisions to the NLRA that would create substantial inhibitions on employers' collective bargaining for the all-important first contract after employees first unionize. The bill allows either party to request mediation if agreement on an initial collective bargaining agreement is not reached within 90 days, and mandates binding arbitration if an agreement is not reached within 30 days of that request. An arbitration board's decision would be binding on the parties for two years unless they mutually agreed to an amendment. This change to the law would severely limit employers' bargaining strategies and freedom to negotiate. The provision might lead unions to inflate their demands, knowing that an arbitration board might well split the difference between the employer's and the union's positions.

C. Damages & Penalties for Unfair Labor Practices

Finally, the EFCA creates for the first time substantial penalties for labor violations. These would apply during any period when unions are attempting to organize and during negotiations of a first contract. Specifically, the bill:

- Increases the penalty for discharging or discriminating against an employee during the relevant period, to provide for back pay plus two times that amount as liquidated damages (treble back pay);

- Creates civil penalties up to $20,000 for employers who willfully or repeatedly violate employees' rights during this period; and

- Requires the NLRB to seek a federal court injunction whenever it believes an employer has committed an unfair labor practice during this period, a possibility that has previously been left to the labor board's discretion.

Ultimately, the EFCA would streamline the process of union organizing and weight the process much more heavily in favor of unions that it has ever been. Conversely, it would make it more difficult for employers to fight union organization efforts and would also limit employers' bargaining power.

II. Further Information

To review the text of the bill, visit: http://thomas.loc.gov and search by bill number H.R.1409

The National Right to Work Legal Defense and Education Foundation, Inc., which opposes the EFCA and provides resources for employees who want to fight "compulsory unionism" maintains a website with helpful information and links: http://www.nrtw.org/.

http://www.americanrightsatwork.org/

Contact information for members of Congress is available at http://www.usa.gov/Contact/Elected.shtml

III. Developing an Action Plan to Prevent Unionization

Despite the present uncertainty over EFCA's ultimate form and fate, union-free employers should consider actions that can be taken now to keep their operations union-free, given that some form of substantial change to the labor laws remains very likely to occur. Following are some examples of such possible action steps.

A. Adopt an Internal Position Statement on Unions and Labor Relations

As a device to help focus your business on the issue of unions and to guide the development of its labor relations strategy, it may be useful to develop an internal position statement on these matters. This statement could subsequently be modified in various ways as needed for communications with management and with employees.

B. Employee Issue and Satisfaction Audit

Dissatisfied employees and festering employment issues are fertile ground for union organizers. Reasonable preventive action includes conducting an objective audit of the workplace for the presence of such issues. It is especially important to analyze the competitiveness of wages and benefits and the presence of employee health and safety concerns.

C. Ensure that Communication Lines are Open and that Managers are Responsive to Employee Issues

Open communication and responsiveness to employee concerns are keys to ensuring that employees don't feel a union is necessary. Employee feedback on issues and problems that arise is critical to ensure that management views are not insulated from workplace realities. Employees' views on the fairness of problem resolutions have a significant effect on the way employees tend to respond to union organizing.

D. Review Employment Policies and Practices

Certain policies, enacted before union organizing occurs, can be effective preventive measures or provide useful tools in the event organizing begins. Because implementing any policy in response to organizing is likely to be construed as an unfair labor practice, it is critical to review policies and revise or implement new policies before organizational activity is present. Policies employers should consider, include:

- A policy on visitors in the workplace that can be used to keep unwanted visitors, including union organizers, out of the workplace
- An open door policy that encourages employees to bring concerns directly to management
- A dispute resolution policy
- A no-solicitation policy
- An e-mail policy covering personal and other uses of business e-mail

In addition, a thorough policy review with labor law issues in mind will screen for policies that may be problematic. The basic rule is that merely maintaining any policy that a reasonable employee would likely interpret as interfering with his or her basic labor law rights is an unfair labor practice, which could have significant negative effect in the context of workplace organizing activity.

Further, it is important to audit for actual employment practice and policy enforcement within the organization because disparate enforcement adversely affecting unions or employees' labor law rights can also be unfair labor practices with substantial negative impact in critical situations.

IV. Conclusion

The action steps recommended above make sense regardless of when, if and in what form the EFCA passes. If the EFCA passes in its current form, many more changes will be required. Because of the significant ramifications the EFCA will have on union organizing, it is a good idea for employers to get started now on their efforts to remain union-free. If you have any questions about the EFCA or steps you can take to deter successful union organizing efforts, please contact Mark Mathison or another member of the Gray Plant Mooty Labor Law Team.